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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK
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IN THE

Supreme Court of the United States

VICTOR GONZALEZ

Petitioner

v.

STATE OF SOUTH DAKOTA

Respondent

On Petition for Writ of Certiorari
To the South Dakota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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In South Dakota, all parties have a statutory and constitutional right to file appeal from a judgment or order. Historically, a notice of appeal could be signed by either an appellant or his or her attorney. In 2007, a requirement was added that required the *appellant only* to sign a notice of appeal in cases involving abuse and neglect of children.

QUESTION TO BE PRESENTED FOR REVIEW:

Does the South Dakota statutory requirement that an appellant in an abuse and neglect case sign the notice of appeal violate the Equal Protection clause of the United State's Constitution when all other litigants have the right to file appeal under signature of their counsel?

PARTIES TO PROCEEDING:

The caption contains all of the names of the parties to the proceeding in *this* Court.

The lower court proceeding included the following parties and Counsel:

State of South Dakota
ex rel Department of Social Services
Yankton County States Attorney
Robert Klimisch
PO Box 708
Yankton, SD 57078
(605)665-9495

HG, the natural mother
Wanda Howey-Fox
PO Box 18
Yankton, SD 57078
(605)665-1001

D.G. and A.G., minor children
Lucille M. Youngberg
Fox, Youngberg & Lewno
PO Box 1017
Yankton SD 57078
(605)665-4308

Petitioner does not believe any of the above parties to the lower court proceeding have an interest in the outcome of this proceeding. A statement to the clerk will be provided per Rule 29(6) and served on the above parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor Gonzalez (Gonzalez) respectfully submits this petition for a writ of certiorari to determine the constitutionality of the refusal of an appeal to the South Dakota Supreme Court.

ACTION BELOW

The Yankton South Dakota Clerk of Courts refused to accept a notice of appeal to the South Dakota Supreme Court pursuant to South Dakota codified law (SDCL) § 15-26A-4(4) because the appellant, Gonzalez did not personally sign the notice.

JURISDICTION

The South Dakota Circuit Court had jurisdiction over the original proceeding to terminate parental rights of Gonzalez pursuant to SDCL § 26-8A-26. The South Dakota Supreme Court has jurisdiction of the appeal of all circuit court rulings pursuant to SDCL § 15-26A-3. The notice of appeal was rejected on March 20, 2008. All remedies have been exhausted as there is no avenue to appeal to the State Supreme Court given the current South Dakota law which is the basis of this appeal.[1] The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

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[1] In *Burns v. Ohio*, 360 U.S. 252, 257, 79 S.Ct. 1164, 1168 (1959), a case cited in this petition, the petitioner faced a similar dilemma because there was no ruling from the Ohio Supreme Court. The U.S. Supreme Court ruled that a delegation to [a] clerk involving no discretion suffices to make the clerks letter a final judgment of Ohio's highest court, as required by 28 U.S.C. § 1257. The present

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

SDCL § 15-26A-4 provides in relevant part:

> Appeals of right—how taken
>
> An appeal permitted by § 15-26A-3 as of right shall be taken as follows:
>
> (1) Notice of appeal. The notice shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall be signed by the appellant or his or her attorney. A notice of appeal filed under chapter 26-8A shall be signed by the appellant and his or her attorney. A notice of appeal filed under chapters 26-7A, 26-8A, 26-8B and 26-8C shall comply with § 15-26A-63.1
>
> ...
>
> (4) Filing notice of appeal and docketing statement. Before the expiration of the time to appeal, appellant shall file the notice of appeal and docketing statement with the clerk of the trial court in which the judgment or order was entered. The clerk of the trial court shall not accept for filing a notice of appeal unless accompanied by a docketing statement and proof of service of copies thereof on each party other than the appellant, together with the required statutory filing fees unless exempt by law. The clerk of the trial court shall not accept for filing

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case is strikingly similar—the notice of appeal was rejected by the trial clerk (without discretion) as required under current law.

a notice of appeal under chapter 26-8A that is not signed by the appellant and his or her attorney.

(5) Transmittal to Supreme Court. Upon compliance with subdivision (4) of this section, the clerk of the trial court shall immediately transmit to the clerk of the Supreme Court certified copies of the notice of appeal, docketing statement, proof of service, the judgment or order appealed from, notice of entry thereof, and the required statutory filing fees unless exempt by law. The clerk of the trial court shall redact the signature of the appellant from any certified copy of a notice of appeal filed under chapter 26-8A that is transmitted pursuant to this subdivision.

...

Failure of an appellant to take any step other than timely service and filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. The failure of the appellant and his or her attorney to sign a notice of appeal under chapter 26-8A deprives the Supreme Court of jurisdiction to decide the appeal.

Amendment 14, section 1 to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the Sate wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case considers whether a South Dakota statute requiring litigants in abuse and neglect cases to sign a notice of appeal to the South Dakota Supreme Court, when no other litigant is required to sign, violates the fourteenth amendment to the United States Constitution.

Gonzalez is the natural father to two children born in the United States. Because the Immigration and Naturalization Service (INS) determined Gonzalez was not a legal citizen, he was deported to Mexico. After he was deported the children were presumably with their mother, but ultimately were taken into protective custody by the South Dakota Department of Social Services (DSS). At the hearing Gonzalez' attorney argued that reasonable efforts[2] should have been made to locate the natural father to reunite parent and children. The court ultimately decided against Gonzalez and terminated his parental rights. Gonzalez, through his attorney[3], filed a notice of appeal of the termination ruling. That notice of appeal was rejected

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[2] Under South Dakota law, reasonable efforts must be made by the Department of Social Services prior to termination of parental rights. SDCL § 26-8A-21.

[3] Until 2007, all appeals in South Dakota were allowed to be filed with the signature of the parties' attorney under 15-26A-4(4). The 2007 amendment to that law is the basis of this petition.

pursuant to SDCL § 15-26A-4(4), because Gonzalez did not personally sign the notice.[4]

REASONS FOR GRANTING THE PETITION

Parties wishing to appeal in abuse and neglect proceedings carry an additional burden not placed on other litigants in South Dakota. South Dakota grants an appeal by right to all litigants in their courts after a final determination, judgment or order[5]. Gonzalez had his parental rights terminated by a circuit court judge on October 30, 2007 (with a final order on February 13, 2008 and noticed for appeal purposes on February 19, 2008). He was deported by INS and therefore unable to sign a notice of appeal. Because of his inability to sign the notice of appeal, he is now precluded from the right to appellate review—a right granted to all other litigants in South Dakota.

Because Gonzalez' fundamental rights to parent his children and judicial review are at issue due to South Dakota's unequal burden to appeal, the petition for writ of certiorari should be granted.

I. The South Dakota statutory requirement that an appellant in an abuse and neglect case sign the notice of appeal violates the Equal Protection clause of the United State's Constitution when all other litigants have the right to file appeal under signature of their counsel.

This petition has a narrow question for review and an equally narrow factual scenario. Although some

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[4] The notice of appeal is in the appendix to this petition.
[5] SDCL § 15-26A-3.

background of the case was given for perspective, the important facts this Court should consider are: Gonzalez lost his parental rights in a state circuit court; Gonzalez attempted to file a notice of appeal in a timely manner as required under South Dakota law; Gonzalez' filing was rejected as required under SDCL § 15-26A-4(4) because he did not sign the notice of appeal; no other litigant in South Dakota is required to sign a notice of appeal according to SDCL § 15-26A-4; and South Dakota allows appeal to the South Dakota Supreme Court as a matter of right.

There are two fundamental rights involved in this case—the right to judicial process, and the right to parent. By placing the signature requirement on Gonzalez, he is denied equal protection as required by the Federal Constitution.

In the case of *Burns v. State of Ohio*, 360 U.S. 252, 79 S.Ct. 1164 (1959), this Court upheld the rule that once a state establishes appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of poverty. *Id.* at 257, citing *Griffin v. People of the State of Illinois*, 351 U.S. 12 at pages 18, 22, 76 S.Ct. 585 at pages 590, 592, 100 L.Ed. 891 (1956). Griffin is still sound constitutional law—once the state chooses to provide review to a given class of litigants, the state cannot enact measures that arbitrarily deny effective appellate review to any particular subclass of the class of litigants. *Jones v. State of Michigan*, 525 F.Supp. 636, 641 (D.C.Mich. 1981). That is exactly what happened in this case. Gonzalez, like all other litigants, has the right to appeal in South Dakota. Only litigants similarly situated to Gonzalez (abuse and neglect proceedings) are required to sign the notice of appeal. The rule of Griffin can be stated to embrace *any* type of discrimination that denies an effective

appeal to a person to whom the right of appeal has already been granted. Id. (emphasis added). Doing so violates the Equal Protection clause in the Federal Constitution.

This Court has previously determined that there is a fundamental right to judicial process through *Burns* and *Griffin*. A person's right to parent his children is also fundamental: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children" (citing *Meyer*[6] and *Pierce*[7]). *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060 (U.S.Wash 2000). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Id.

Because of the two fundamental rights enjoyed by Gonzalez, the State is prohibited from placing an unequal burden to appeal. State action cannot abridge a fundamental right unless the abridgment is necessary to fulfill a compelling state interest. *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967). In addition, the compelling state interest test is nearly impossible to satisfy. *Jones* at 640.

CONCLUSION

Gonzalez will never get the benefit of judicial review unless this court grants his petition for certiorari. His fundamental right to judicial process

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[6] *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923).

[7] *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571 (1925).

and parenting his children are in jeopardy due to South Dakota's arbitrary, unequal requirement that he sign his notice of appeal. He should be given the same rights as all other litigants in South Dakota.

For this and the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted on June 17, 2008,

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(605)665-3000

Counsel for Petitioner

APPENDIX A:

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: §	FIRST JUDICIAL CIRCUIT
COUNTY OF YANKTON)	JUVENILE DIVISION

* *

THE PEOPLE OF THE STATE OF SOUTH DAKOTA, EX REL. SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, IN THE INTERESTS OF DG AND AG, A MINOR CHILD, AND CONCERNING HG AND VG, RESPONDENTS.	JUV. 07-33/07-64 **NOTICE OF APPEAL**

* *

TO: ROBERT W. KLIMISCH, YANKTON COUNTY STATE'S ATTORNEY

Please take notice that VG appeals to the Supreme Court of South Dakota from final judgment rendered in this action on the 13th day of February, 2008.

Dated this 19th day of March, 2008.

KENNEDY, ROKAHR, PIER & KNOFF LLP

/s/_____

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Yankton, SD 57078
(605) 665-3000
Attorneys for V G

VG *

* VG was deported prior to adjudication and disposition and is unable to sign pursuant to § 15-26A-4(1).

3/20/08
Rejected by Clerk of Courts
/s/Tracey Chambers
Magistrate Deputy

CLERK OF COURT
YANKTON COUNTY
PO Box 155
Yankton, SD 57078-0155